Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term 1999

N.T. BROTHER GREENE,

Petitioner,

v.

WILLIAM HACKETT, *et al.*,

Respondents.

Petition For a Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a *pro se* litigant with one or more viable constitutional claims, who earlier sought but was denied counsel, has appealed his "total case" in an appeal of an unappealable order which is pending before an appellate court, when the district court issues a final order dismissing his case for failure to amend, should the district court, in stewardship of the appellate court's jurisdiction, as a matter of due process and equal protection independently, or under 28 U.S.C. § 1915, be required to supplant the administration of equal access to justice by then providing counsel to advise on the need to appeal, or by providing notice of the need to appeal, in those districts which do not provide such notices.

LIST OF PARTIES

The following individuals or entities may have an interest in the outcome of this appeal:

Batson, John P. - Attorney for Plaintiff-Petitioner
Gilless, A.C. - Defendant-Respondent
Greene, N.T. Brother - Plaintiff- Petitioner
Hackett, William - Defendant-Respondent
Rolwing, Robert - Attorney for Defendants-Respondents
Shelby County, Tennessee - Entity Defendant of Sheriff and others
Vaught, (First Name Unknown) - Defendant-Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, N.T. Brother Greene, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The challenged opinion by a panel of the Sixth Circuit

is not published, but is reproduced in the Appendix, filed separately, at App. 36. The Sixth Circuit order denying rehearing is at App. 42. Neither of the Sixth Circuit Orders addresses the need to appoint counsel for advice on the need to appeal, nor addresses the fact that district courts in other circuits provide notice about appeal. The District Court's order denying the motion to appoint counsel is at App. 22. The District Court's Order denying the motion to extend time to appeal is herein at App. B 1 & B 2, but it does not address the issues raised in this Petition.

STATEMENT OF JURISDICTION

The Sixth Circuit entered its denial of a petition for rehearing on February 18, 2000. (App. 42). The petition for rehearing was timely filed.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

AMENDMENT VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981. Equal Rights Under the Law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982. Property Rights of Citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1915 (e)(1)

The court may request an attorney to represent any person unable to afford counsel.

STATEMENT OF THE CASE

The *pro se* Plaintiff filed a complaint of constitutional claims against a Judge, Sheriff, Deputy and unknown Deputies from Memphis, for violation of rights protected by the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments, pursuant to 42 U.S.C. §§ 1981-1988, seeking damages, and declaratory and injunctive relief. (App. 1-8). Jurisdiction was conferred under 28 U.S.C. §§ 1331 and 1343(a)(3). (App. 3). Plaintiff sought a jury trial. (App. 8).

In the claim which relates to Plaintiff's inability to find counsel and the need for a notice regarding appeal, (See App. 20 & 21; 30-31), Plaintiff sued Judge Hackett, from a court in Memphis, Tennessee with jurisdiction over landlord tenant matters. Plaintiff is a landlord.

Judge Hackett jailed Plaintiff for six days without a hearing, because of a verbal exchange between the two in a courthouse hallway. (App. 1). The Complaint specifically alleged the communications were "not during any court or official proceedings." (App. 1). According to the Complaint, Judge Hackett volleyed the first unseemly shot about who was a liar. (App. 4). Judge Hackett called Greene a liar, or said something was a lie, and Greene responded. (*Id.*). Hackett upped the ante and said that what Greene had said was a "damned lie," to which Greene "responded in kind." (App. 4). Judge Hackett had Plaintiff arrested by a deputy standing nearby in the hall, who immediately took Plaintiff to jail. (*Id.*).

Judge Hackett is a White and Greene, is an African American, which Plaintiff alleged played an impermissable factor in his unlawful summary conviction and jailing. (App. 4). The fact Defendant Hackett is a judge and race were alleged to be a factor in the inability to find an attorney. (App.31).

The gravamen of Plaintiff's Complaint against Judge Hackett is that Plaintiff was jailed without notice of a charge, (App. 7, ¶ 22) meaningful notice or opportunity to be heard, all

in denial of equal protection. (App. 1-8).

Plaintiff suspected he had been arrested for criminal contempt of court (App. 1), but "[n]o mention was made of criminal contempt."[1] (App. 4).

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[1] The "charge" against Plaintiff is important because it was a factor in the District Court's decision to order Plaintiff to amend, which he did not do because he was "on appeal" of the reversal of the default and of the "total case". (App. 24). The District Court erroneously found that it was "unclear from the complaint as filed whether any claim has accrued as yet. . . Plaintiff shall . . . amend [ ] . . . explaining what charges were filed against him, and whether those charges have been resolved," (App. 18) citing *Heck v. Humphrey*, 114 S.Ct. 2364 (1994). (App. 17).

The Complaint neither expressly nor implicitly stated that charges were pending. The Complaint states that Plaintiff had been jailed for criminal contempt, although when the incident occurred Plaintiff had no understanding why he could be jailed for verbally defending himself in a courthouse hallway. (App. 1-8).

Respondent took the position in the Sixth Circuit that indeed Plaintiff had been arrested for criminal contempt under Tenn. Code Ann. § 29-9-102. Appellees' Brief at 19, *Greene v. Hackett, et al.*, No. 98-5831, (6th Cir.)(filed 1/25/99). Tenn. Code Ann. § 29-9-102 follows:

...(1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice.

...(4) Abuse of, or unlawful interference with, the process or proceedings of the court.

"Incarceration for up to ten days is provided at T.C.A.

The complaint alleged denial of medical care by the Sheriff individually, and in his official capacity. Greene, who was seventy-one, was recovering from prostate surgery and his abdomen was still bandaged, which needed changing. (App. 2, 4-5). Greene alleged medical conditions for which he required medications on a regular basis, which the jail did not provide on schedule. (*Id.*). Greene alleged he informed the Sheriff and the health personnel at this jail of his medical needs. (*Id.*).

Greene also alleged that some time later, when he returned to the Department to inquire about a separate matter, Defendant Deputy Vaught and the Unknown Deputy assaulted him, in part because of retaliation for filing internal grievances about his treatment while jailed. (App. 6).

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§ 29-9-103(b). Our state Supreme Court has ruled that,

> Conduct directed against the dignity and authority of the court or a judge acting judicially, or an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect, constitutes criminal contempt.

Gunn v. Southern Bell Tel. & Tel. Co., 201 Tenn. 38, 396 S.W.2d 843 (1956), quoted at 7 *Tenn. Juris.*, Contempt § 7." Appellees' Brief at 19, *Greene v. Hackett, et al.*, No. 98-5831 (6th Cir.)(filed 1/25/99).

On the other hand, Plaintiff has asserted, and will assert, that Tennessee's summary criminal contempt proceeding, on its face, or as implemented in this circumstance, violates due process and equal protection.

On appeal Petitioner argued that Plaintiff was entitled to rest on his complaint as pleaded and that Plaintiff did not need to amend.

Greene served the Defendants by certified mail, who did not answer, so he moved for default, (R.6, Apx. pg. 17)[2] which the Clerk granted. (R.7). Defendants moved to open, (R.8) and to extend the time to answer. (R.9). Greene opposed the enlargement and sought default. (R.10, Apx. pg. 25). The District Court set aside the default on October 17, 1997. (R.11).

On the same day, by separate order, the District Court partially dismissed the Complaint, and ordered Greene to amend. (App. 9-19). (R.12). Greene had alleged some credit cards he had turned in during intake were taken and used. This claim was dismissed because the District Court found Tennessee afforded adequate remedy. (App. 11). The District Court dismissed the medical claims against the Sheriff in his individual and official capacities. (App. 12-15). The claims against Judge Hackett in his official capacity as claims against the State barred by the Eleventh Amendment. (App. 16).

As is reflected in n.1 above, the claim against Judge Hackett in his individual capacity was to be amended because the District Court was unsure what the charge was, and no outcome had been stated, and therefore under *Heck v. Humphrey*, the claim had not matured. (App. 17-18).

A claim against Unknown Deputies was dismissed. (App. 9 & 10). The District Court did not address the claim against Deputy Vaught (App. 6 ¶ 20) for excessive force and retaliation. (App. 9-19).

The Order gave *pro se* Greene twenty days to amend his Complaint. (App. 18). On appeal to the Sixth Circuit in the second appeal Greene argued that this order required a level of specificity which violated *Leatherman v. Tarrant County*

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[2] "R" refers to the document number in the District Court docket sheet. "Apx. pg." refers to the Joint Appendix page, filed with the Sixth Circuit Court of Appeals.

Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Appellant's Reply Brief at 4, *Greene v. Hackett, et al.*, No. 98-5831, (6th Cir.)(filed 12/9/98).

After much of his Complaint was dismissed and he was ordered to amend that which was simply stated, Plaintiff Greene, feeling the waters starting to swirl around him, moved for appointment of counsel on November 7, 1997. (R.13, Apx. pg. 40). The District Court denied the appointment in a conclusory fashion and summarily considered whether exceptional circumstances existed, i.e. the type of case and Plaintiff's abilities to represent himself. (App. 22-23). The District Court concluded that "exceptional circumstances . . . do not exist at this time." (App.23). Plaintiff was given thirty days from November 10, 1997 to amend. (*Id.*).

The *pro se* Plaintiff then moved to recuse Judge Turner, because Judge Turner opened the default without giving Greene a hearing. (R.15). Judge Turner denied the recusal motion on December 1, 1997. (R.16, Apx. pg. 45).

On November 26, 1997, *pro se* Greene requested a hearing on the default, claiming he could prove personal service and knowledge, to show, in his view, entitlement to default; notwithstanding a court's discretion to open default. (R.17).

The District Court denied the request for a hearing on the default, and ordered the *pro se* Plaintiff to show cause why on December 25, 1997 he had not filed the previously ordered amendment. (R.18). The Court warned that failure to respond "may" result in dismissal for failure to prosecute under F.R.Civ.P. 41. (R. 18 at 3).

The Defendants moved to dismiss, asserting Plaintiff's failure to file the amendment as the basis. (R.19).

Pro se Plaintiff filed a motion requesting the District Court to respond to his motion requesting a hearing on the opening of default. (R.20).

The District Court denied Defendants' motion to dismiss

without prejudice on December 22, 1997. (R.21).

The *pro se* Plaintiff responded to the Order denying his request for a hearing on the opening of the default, proffering in a motion on December 26, 1997, that he could show "that someone has served all of the defendants on a specific date." (R.22).

The District Court denied the motion on December 30, 1997 to reconsider the opening of default, and reiterated that the Court had ordered the filing of an amended complaint, or a response. (R.23).

The Defendants refiled their motion to dismiss on January 6, 1998. (R.24, Apx. pg. 64-66).

On January 12, 1998, the *pro se* Plaintiff filed his first of Notice of Appeal of "the total case in order to preserve the substantive issues of this case for a later date in the District Court." (App. 24). (R.25). This first appeal was "pending" before the Sixth Circuit until May 1, 1998, when a Panel dismissed it for lack of jurisdiction because "no appealable order had been entered ... ." (App. 28 & 29). (R.30). No notice was sent to *pro se* Plaintiff explaining a "final" judgment. *See e.g.*, Civil Appeals Checklist (App.38)(Proper filing procedures for the Eleventh Circuit).

While Mr. Greene's "total case," in the first appeal was within it's the Sixth Circuit's plenary jurisdiction to determine whether a final order had been appealed, to which Mr. Greene was oblivious, the District Court issued an Order and Judgment on January 14, 1998, dismissing Plaintiff's complaint for "failure to prosecute," because Plaintiff did not amend his complaint. (App. 26 & 28). (R.27).

As mid-February came and went, no notice of the need to appeal was sent to Mr. Greene. The District Court did not reconsider whether "at this time" "extraordinary circumstances existed." As the time in which to file a motion to enlarge time to file an appeal passed, the District Court did not exercise the discretion of the appellate courts to ensure due process and

equal protection, as to the convergence of substance and procedure, of when to appeal.

On May 1, 1998, the Panel in the first appeal dismissed because there had not been an "appealable order." (App. 28 & 29). (R.30).

On May 13, 1998, *pro se* Plaintiff filed a motion to extend time to file appeal to the Sixth Circuit. (App. 30-32. (R.31). In the motion Greene alleged some of the facts of his Complaint, that White government officials violated his rights. (App. 30). He alleged Black citizens were especially afraid of city officials. (App. 30). Plaintiff said he could not get Black lawyers to represent him in this case with a White Judge. Plaintiff reiterated how he had tried to get lawyers from "Jackson, MS., Nashville, TN., St. Louis, MO., Little Rock, AR; and elsewhere." (App. 31). Plaintiff requested that the due process provisions help "restore the belief that it is no longer necessary to be scared and intimidated where your rights are concerned in Memphis, TN." (App. 31-32). On May 21, 1998 Greene amended his motion requesting the district court to grant him permission to appeal out of time. (App. 33).

On May 22, 1998, the District Court denied the motion to extend time to file the appeal. (App. B1 herein). (R.34). The District Court denied the motion to extend time to file a because the motion was filed more than thirty days after time to file, concluding it had no discretion. (App. B1). (R.34). The Court noted that Judgment was entered January 14, 1998, and the motion to extend was filed May 13th. (App. B1).

On June 4, 1998 the *pro se* Plaintiff filed his second notice of appeal, and queried in a footnote, "Why is it necessary for this plaintiff to pay another filing fee to have the judges rule on this appeal? If there was nothing for the appeal judges to consider, why must this plaintiff have to pay again to have his appeal considered by the Appeal Court judges now?" (App. 34-35). (R.36).

Respondents herein, Defendants Hackett, et al., filed a

motion to dismiss in the Sixth Circuit. *N.T. Greene v. William Hackett, et al.*, No. 98-5831 (Filed 8/19/98). The undersigned filed a Notice of Appearance on August 20, 1998. On Plaintiff Greene's behalf, a response to the motion to dismiss was filed September 2, 1998. The Sixth Circuit denied the motion to dismiss.

In relationship to this certiorari petition, Petitioner Greene raised the following issue in the second appeal to the Court of Appeals Sixth Circuit:

> I. The district court erred in exercising or failing to appropriately exercise, the stewardship of this court's appellate jurisdiction.

Three other issues were raised regarding the viability of the Complaint, but are not determinative as to the questions presented for certiorari. (Appellant's Brief at 2, *Greene v. Hackett, et al.*, No. 98-5831, (6th Cir.)(filed 10/26/97)).

Plaintiff argued to the Sixth Circuit that under the circumstances here, a notice of the need to file a second notice of appeal, or to appoint a lawyer to advise about the need to file a second appeal, should have been provided, to ensure fundamental fairness; or another corrective measure should have been imposed. Plaintiff pointed out that when to appeal was a matter for the appellate courts, in consideration of a governmental system for the administration of justice. Plaintiff argued that other circuits, by way of their district courts, provided notice, or an attorney could be provided simply, to advise when to appeal. Examples were given of notices provided to persons traversing the waters from administrative shores to judicial shores.

On December 17, 1999 the Panel issued the opinion which is the basis of this petition. (App. 36). The Panel determined that the District Court did not abuse its discretion in denying the extension of time in which to file the appeal because it lacked authority to grant an untimely motion. (App.37). The Panel did not address appointment of counsel

nor providing notice of the need to appeal.

A Petition for Rehearing With Suggestion for *En Banc* Rehearing was filed December 31, 1999. The petition included an Attachment B which was a Civil Appeals Checklist from the Eleventh Circuit given to litigants in the Southern District of Georgia. (App. 38-41). The Petition for Rehearing was denied on February 18, 2000. (App. 42).

REASONS FOR GRANTING THE WRIT

When a *pro se* litigant with one or more viable constitutional claims, who earlier sought but was denied counsel, has appealed his "total case" in an appeal of an unappealable order which is pending before an appellate court, when the district court issues a final order dismissing his case for failure to amend, should the district court, in stewardship of the appellate court's jurisdiction, as a matter of due process and equal protection independently, or under 28 U.S.C. § 1915, be required to supplant the administration of equal access to justice by then providing counsel to advise on the need to appeal, or by providing notice of the need to appeal, in those districts which do not provide such notices.

This case asks this Court to address the question of appellate jurisdiction to ensure the fair and efficient administration of a *pro se* litigant's entry into the appellate system by notice about the determination of when to file an appeal based on a final order, or the appointment of counsel for that purpose.

Some districts provide such a notice while others do not. As a manner of speaking, there is a split in the circuits or districts – albeit *de facto*.

The District Court erred in its stewardship of appellate court jurisdiction. The District Court was deliberately indifferent to a prior request for counsel and Plaintiff's inability

to find counsel because a defendant was a judge, and because of race.

Plaintiff sought, but was denied counsel. The District Court found that the "exceptional circumstances," that is the type of case and the ability of Plaintiff to represent himself, did "not exist at this time." (App. 22 & 23). At some point in the proceedings, if notice of the need to appeal were not meaningfully provided, then *sua sponte* the District Court should have reconsidered the appropriate factors to appoint. *Poindexter v. FBI*, 737 F.2d 1173, 1984 U.S. App. LEXIS 21116, at **18, n. 8 (U.S. App. D.C. 1984).

Petitioner suggest that this decision, while implemented by the district court in the first instance, should be reviewed *de novo* by the appellate court. Either the notice reviewed as to meaningfulness under the circumstances, or the appointed decision reviewed consistent with *Poindexter v. FBI*, 737 F.2d 1173, 1984 U.S. App. LEXIS 21116, at **18, n. 8 (U.S. App. D.C. 1984).

Under the circumstances of this case, a notice of the need to appeal should have been provided, or a lawyer appointed to advise this *pro se* Plaintiff,[3] who filed a premature notice of appeal of the "total case," of the need to file a second notice of appeal after entry of the "final order."

The record reflects a plaintiff confounded by the course of these particular proceedings, who had sought, but was denied, appointment of counsel, in an action where he sued a Memphis Judge for jailing him, without even a semblance of a trial, for comments he made to the Judge, in response to

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[3] The ranks of *pro se* litigants are ever increasing. This Court may take Judicial Notice of the reports from the Administrative Office of the United States Courts which reported on 12/28/99 that there were 54,693 cases commenced, of which 24,416 were *pro se* at filing.

untoward comments by the Judge, outside of a judicial setting.

This Court has jurisdiction to address that portion of appellate court justice administration which, of necessity, occurs while the litigant is in the district court. This case addresses the administration of justice in protection of the very beginnings of the appellate process. The issue is about a litigant's knowledge of when to file a notice, or in this case, a second notice, of appeal.

Even though in a fundamental sense the line of jurisdiction between the district and appellate court is drawn with the filing of the notice of appeal, and although the right notice at the right time was not filed here, the issue here is a matter of primary appellate concern, and could be characterized as a plenary jurisdiction, administrative concern of an appellate court. *See e.g., Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998)(appellate jurisdiction to address notice requirement to respond to summary judgment). This Court has an interest in creating an appellate system which avoids appearance that access to appellate review is controlled by the district court.

Like the criminal defendant's protection of important rights a civil litigant is at a critical stage, bearing upon protection of fundamental rights, when an order is issued which is adverse, and the order is palpably final, and the thirty days to appeal had begun. The critical nature of filing the notice is clear.

> "the failure to file a requested appeal constitutes *per se* ineffectiveness, a petitioner need not demonstrate prejudice, that is, that his attorney's failure to file the requested notice jeopardiz[es] a substantial prospect of success on appeal." *Castellanos [v. United States]*, 25 F.3d [717], at 718 [(7th Cir. 1994)].

Schmude v. U.S., 151 F.3d 1033, 1998 WL 433015, 2 (7th Cir. 1994). When to appeal, especially in light of a previous appeal, and the final order doctrine, and a disappearing jurisdiction of

an apparent appeal makes determination of that critical stage elusive, in the least.

There is a growing belief in the Circuits of the need to provide to the ever-increasing number of *pro se* litigants notice of their right in the next step of the process to protect substantive justice. The following reflects Circuits which require notice to a *pro se* litigant of the need to respond to summary judgment, without resort to a harmless error examination. *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998)(*pro se* prisoner entitled to "fair notice of requirements of summary judgment"); *Hudson v. Harly*, 412 F.2d 1091 (D.C. Cir. 1968)(Terminal Fair Notice Case); *Champion v. Artuz*, 76 F.3d 483, 486 (2nd Cir. 1996); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982)(notice to *pro se* prisoner of consequences of failure to file); *Griffith v. Wainwright*, 772 F.2d, 822, 825 (11th Cir. 1985)("adverse party" must be given notice). *But see, Williams v. Bowman*, 981 F.2d 901, 903 (6th Cir. 1952)(no authority within the circuit); *Martin v. Harrison Co. Jail*, 975 F.2d 192, 193 (5th Cir. 1992).

The Plaintiff can hardly be faulted for lack of trying. Plaintiff filed a premature notice of appeal on the "total case." It was counter-intuitive to file a second notice. Plaintiff previously sought appointment of counsel, who by review of the record later in the proceedings was lost in the procedure. This Plaintiff could not find a lawyer who would sue a Judge.

He thought he had a procedural default and got lost in trying to maintain it. He was not dilatory in filing his appeal, in fact an appeal was filed prematurely, to preserve the "total case" and appeal his procedural default issue.

When the final order for failure to amend was issued Plaintiff thought he already had an appeal to the "total case" in the jurisdiction of the Appellate Court.

The "time" had come to the District Court to give notice of the need to appeal or appoint a lawyer. (App. 23). Nothing

was done even after the first thirty days had run, and Plaintiff sought appellate review of the "total case," Plaintiff had been blind-sided by filing the early appeal. No notice or warning was given by the District Court. The District Court failed to reconsider appointment at that time.

This case asks this Court to import the practice of requiring notice of the need to respond to summary judgment, used in a majority of Circuits, to the situation here, as to the notice of the need to appeal after a final order. Help was sought, and not provided. A majority of the circuits require notice to *pro se* litigants in summary judgment proceedings, and this case asks this Court to apply that rule as to notice of the need to file an appeal, or to provide an attorney to convey that knowledge, where attempted active protection of rights caused the exact opposite and fundamentally unfair result, because of the oft elusive "final order" doctrine.

Petitioner suggests that whether to appoint counsel to advise on when to appeal or whether to provide any notice of the need to appeal identifying appealable final orders should be a standard determined *de novo* on appeal by appellate courts, and not a review of a district court's exercise of discretion. Protection of appellate court jurisdiction and access to appellate courts should not be determined as a constitutional matter by the court from which a litigant seeks appellate relief.

Courts have recognized four factors to consider in the appointment of counsel:

> (1) the ability of the plaintiff to afford an attorney;
> (2) the merits of the plaintiff's [**37] case;
> (3) the efforts of the plaintiff to secure counsel; and
> (4) the capacity of the plaintiff to present the case adequately without aid of counsel.

Poindexter v. FBI, 737 F.2d 1173, 1186, 1984 U.S. App.

LEXIS 21116, at **37 & **38 (U.S. App. D.C. 1984)("While these factors ordinarily should be considered by the trial court, this list is not necessarily exclusive.").

Even if a *pro se* were wealthy,[4] where the presence of a particular defendant has made it difficult to obtain counsel, the factors of ability to pay must by considered in light of the litigant's ability to pay not just a reasonable fee, but a premium which would attract competent counsel willing to forego the loss of business or income which would follow representation against the powerful Defendant. *See e.g., Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305, 1309 (5th Cir. 1977)(inability of plaintiff to find counsel because of unpopularity in some locations). "[T]here will also be cases in which an analysis of one of the factors we have enumerated will be dispositive, obviating the need for consideration of the other factors." *Poindexter v. FBI*, 737 F.2d 1173, ___ 1984 U.S.App. LEXIS 21116, [**39] (U.S.App.D.C. Cir. 1984). In this case, perhaps the fact that Plaintiff has sued the Judge in Memphis will prove to be dispositive.

Providing a notice to a *pro se* would in most circumstances be an effective solution. In those circumstances where there was a possibility of meritorious claim, and it had earlier been found that the particular litigant could understand and present the claim, it is likely a simple notice would meaningfully inform the litigant of his obligations in order to seek appellate review of substantive matters. If the particular litigant, or the circumstances made it likely that the particular litigant could not protect his rights, then an attorney would be

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[4] The fact that Plaintiff had some money should not preclude consideration of the other factors. A litigant need not be destitute nor proceeding *in forma pauperis* to obtain counsel. *Poindexter v. FBI*, 737 F.2d 1173, 1984 U.S. App. LEXIS 21116, at **40 (U.S. App. D.C. 1984).

appointed to advise the litigant about when to appeal. The District Court could even have a hearing to notify the litigant of rights.

Further, as to the factor of meritorious claims, where qualified immunity is afoot, and the "clear" meaning of the Constitution at stake, not only for the parties, appointment of counsel is necessary as a matter of public interest. *See e.g., Hyman v. Rickman*, 446 U.S. 989, 100 S.Ct. 2976, 64 L.Ed.2d 847, 1980 LEXIS 1965 (1980)(Blackmun, J., Brennan J., Marshall, J., dissenting).

This Court, as a matter of administering its jurisdiction, has reason to require district courts to either send out clear notices to all litigants that a particular decision is a "final order," and that if review is desired, an appeal should be filed within thirty days. Concomitant with that, should be the obligation of a district court, on behalf of a court of appeals to send notice to a *pro se* litigant, who has prematurely filed an appeal, that a subsequent appeal notice may need to be filed, or at that point, to provide an attorney, for the limited purpose of advising the *pro se* litigant, when an appeal must be filed.

This case asks this Court to take a duty-bound simple step, which can be justified a thousand times over in the name of fundamental fairness, due process and efficiency. This case asks that litigants be given a notice regarding appeal, at appropriate times, similar to the Civil Appeals Checklist. (App. 38). This appeal seeks a ruling that the process afforded Mr. Greene was Constitutionally infirm because no such notice was provided, and therefore that he be made whole by being allowed to have his appeal deemed timely. Alternatively, it seeks *de novo* appellate jurisdiction over the *sua sponte* need to reconsider appointment of counsel to safeguard the key to the appellate process.

The *de facto* rule of the Eleventh Circuit's administrative processes, to guarantee a fair first step of the appellate process, should become the *de jure* rule of all Circuits. This case has all

the factors to compel such a result. Substantively and procedurally this is a worthy case.

Because more and more litigants are *pro se*, entry into the appellate system, should be available in a fundamentally fair and efficient way; other than having an appellate Court tell the litigant, for the first time, the order appealed was not appealable. This Court knows the judicial resources which are spent on the final order issue, and realizes how much would be saved by notice to litigants, *pro se* or represented.

CONCLUSION

For the reasons stated the petition for the writ of certiorari should be granted.

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Counsel of Record
Attorney for Petitioner

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App. B 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED MAY 22 1998 ROBERT DI TROLIO, Clerk (R.34)
Plaintiff,	)	
(5)	)	
	)	CIVIL ACTION
WILLIAM HACKETT, et al.,	)	NO. 97-2799 TUV
Defendants.	)	

ORDER ON MOTION TO EXTEND TIME TO FILE THIS APPEAL TO THE 6TH U.S. CIRCUIT COURT

The pro se plaintiff has filed a motion with this court requesting that the court extend the time within which the plaintiff may file an appeal from the judgment of this court.

On January 14,1998, the court dismissed this case with prejudice. A judgment was entered on January 20, 1998. Thus, the plaintiff's motion, filed on May 13, 1998, is presented to the court approximately four months after the entry of judgment.

Rule 4(a)(5) of the federal Rules of Appellate Procedure provides that:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4 (a).

Although no showing has been made of excusable neglect or good cause, the district court has no authority to

extend the time to file a notice of appeal when such a motion is filed more than 30 days after expiration of the time prescribed by Rule 4(a). Rule 4(a)(1) allows a notice of appeal to be filed within 30 days after the date of entry of the judgment. Therefore, the time within which this court's authority to extend the time to file a notice of appeal expired in March of 1998.

This motion to extend time to file an appeal is therefore denied.

IT IS SO ORDERED this 22nd day of May, 1998.

/s/ Jerome Turner
U.S. District Judge

99186? MAY 18 2000

(2)

OFFICE OF THE CLERK

NO. _____

In The

Supreme Court of the United States

October Term 1999

N.T. BROTHER GREENE,

Petitioner,

v.

WILLIAM HACKETT, *et al.*,

Respondents.

Petition For a Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

APPENDIX TO CERTIORARI PETITION

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED SEP 4 1997 ROBERT DI TROLIO, Clerk (R.1)
Plaintiff-*pro se*,	)	
v.	)	
WILLIAM HACKETT, in his personal and official capacity General Sessions Court Judge of Shelby County, Tennessee, Division II; A.C. GILLESS, in his personal and official capacity as Shelby County Sheriff, VAUGHT, First Name Unknown, in his personal and official capacity as Shelby County Deputy Sheriff,	) CIVIL ACTION) NO. 97-2799 TUV	
Defendants.	)	

COMPLAINT

I. INTRODUCTION

1. The Honorable William Hackett, a white Shelby County General Sessions Court Judge, Division II, did wilfully and purposefully violate the constitutional rights of N.T. "Brother" Greene, a 71 year-old Black man, on September 6, 1996, when, not during any court or official proceedings, he did abuse his authority and hold Plaintiff Greene in criminal contempt of court and sentence him to ten (10) days in the Shelby County Jail.

This contempt citation was imposed in the hallway of the Shelby County Courthouse after a verbal exchange between Judge Hackett **[end 1]** and Plaintiff Greene in full sight of various Sheriff's Deputies and other court personnel and citizens.

2. Although Plaintiff immediately informed Judge Hackett that he had recently had surgery for prostate cancer on August 30, 1996, and spent 4 days in hospital recovery, and was literally still bandaged about the abdomen on September 6, 1996, Judge Hackett instructed the Sheriff's deputies to incarcerate this ill man.

3. Plaintiff Greene was incarcerated at the County Jail at 201 Poplar Avenue, Memphis, Tennessee, in the bullpen with the general population of various and sundry inmates awaiting trial and sentencing for all types of offenses. Inmates became immediately aware of Plaintiff's weakened condition and when they noticed there were no chairs in the bullpen, a chair was requested of the deputy on duty. The deputy responded to "let [Plaintiff Greene] sit on the floor" in the pooled urine. The unsanitary conditions of confinement posed a grave threat to Plaintiff's life as he had undergone invasive surgery on August 30, 1996, and was not yet healed. The presence of bacteria and viruses in the "bullpen" presented a serious danger to Plaintiff's health and life.

4. At first opportunity, plaintiff requested to see the jail nurse and informed her and others again of his poor health condition, including having had recent surgery and resulting open incisions, life threatening high blood pressure, asthma, and hemorrhoids. Plaintiff pleaded that his son, Malcolm Greene, be **[end 2]** allowed to bring his medication and assist with his required post-operation regimen.

5. During his incarceration, Plaintiff's credit cards were stolen from the Sheriff's "safekeeping" and used at numerous stores. Despite repeated requests for an investigation to Defendant A.C. Gilles and the Federal Bureau of Investigation, as of this filing, Plaintiff has not been informed of the

performance of any inquiry into the matter, much less resolution.

6. Plaintiff seeks declaratory and injunctive relief against Defendants on the grounds that their practices beginning on September 6, 1996, until Plaintiff's subsequent release from the Shelby County Jail, and on December 5, 1996, violated Plaintiff's rights under the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution. Plaintiff also seeks compensatory damages in the amount of $1 million for pain and suffering, as well as punitive damages in the amount of $3 million from Defendant William Hackett, $3 million from Defendant A.C. Gilles, and $300,000 each from Defendants _____ (First Name Unknown) Vaught and Unknown White Deputy.

II. JURISDICTION

7. This suit is brought under the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983, 42 U.S.C. §§ 1981-88. Plaintiff also seeks relief pursuant to 18 U.S.C. §§ 1202(a), 241, and 242. Jurisdiction over Plaintiff's **[end 3]** claims is conferred on this Court by 28 U.S.C. §§ 1331 and 1343(a)(3).

8. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

III. VENUE

9. The Western District of Tennessee is an appropriate venue for this action under 28 U.S.C. § 1391(b)(1), because Defendants in their official capacity reside in this district. *See also* 28 U.S.C. § 1392(a). The Western District of Tennessee is also an appropriate venue under 28 U.S.C. § 1391(b)(2) because a "substantial part of the events or omissions giving rise to the claim[s] occurred" in this district.

IV. PARTIES

10. DEFENDANT WILLIAM HACKETT (hereinafter "JUDGE HACKETT") is sued in his official capacity as Shelby County General Sessions Court Judge, as well as his personal capacity.

11. DEFENDANT A.C. GILLES (hereinafter "SHERIFF GILLES") is sued in his official capacity as Sheriff of Shelby County, as well as his personal capacity.

12. DEFENDANT _____ (First Name Unknown) VAUGHT and UNKNOWN WHITE DEPUTY, are sued in their official capacities as Sheriff's Deputies, as well as their personal capacities.

13. PLAINTIFF N.T. "BROTHER" GREENE, [hereinafter PLAINTIFF or PLAINTIFF GREENE], a United States Citizen, was denied his **[end 4]** right to free speech, to be free of unreasonable searches and seizures by the State of Tennessee, to be free from cruel and unusual punishment, to be free from punishment without due process of law, to fundamental due process, to be free from an unconstitutional taking of property, to be notified of charges against him, to equal protection of the laws, and to be free from badges and incidents of slavery.

V. FACTUAL ALLEGATIONS

14. On September 6, 1996, Plaintiff N.T. "Brother" Greene and Judge William Hackett had a verbal disagreement in a public hallway of the Shelby County Courthouse before numerous court personnel and citizens. Plaintiff Greene had not appeared before Judge Hackett in any proceeding that day or recently. During the disagreement, Judge Hackett called Plaintiff Greene "a lie," [sic], and Plaintiff Greene responded in kind. Judge Hackett then referred to Plaintiff Greene as "a damned lie," [sic] where Plaintiff Greene responded in kind. Judge Hackett had become increasingly angry and, at that time, told a nearby law enforcement officer to arrest Plaintiff Greene and lock him in the Shelby County Jail. No mention was made of a criminal contempt citation.

15. Plaintiff Greene was informed that Judge Hackett had ordered his incarceration for ten (10) days. Plaintiff Greene, a 71 year-old man, was recovering from prostate surgery performed on August 30, 1996, and his abdomen was still extensively bandaged **[end 5]**. He was also suffering from life-threatening high blood pressure, asthma, and hemorrhoids, for all of which he was on constant medication. Prior to Plaintiff Greene being put into the Shelby County Jail, Judge Hackett and Sheriff Gilles were informed in detail of Plaintiff Greene's serious health concerns.

16. Without responding with modified treatment or alternative incarceration, Sheriff Gilles put Plaintiff Greene in the "bullpen" with the general population of various and sundry inmates awaiting trial and sentencing for all types of offenses. Inmates immediately became aware of Plaintiff Greene's weakened condition and when they noticed there were no chairs in the "bullpen," a chair was requested of the deputy on duty. The deputy responded to "let [Plaintiff Greene] sit on the floor" in the pooled urine. The unsanitary conditions of confinement posed a grave threat to Plaintiff's life as he had undergone invasive surgery mere days earlier and was not yet healed. The presence of bacteria and viruses in the "bullpen" presented a serious danger to Plaintiff's health and life.

17. At first opportunity, plaintiff requested to see the jail nurse and informed her and others again of his poor health condition, including having had recent surgery and resulting open incisions, life threatening high blood pressure, asthma, and hemorrhoids. Plaintiff pleaded that his son, Malcolm Greene, be allowed to bring his medication and assist with his required post-operation regimen. Plaintiff Greene was never **[end 6]** given his appropriate medicines at proper times and under prescribed condition during the entire time he was incarcerated.

18. During his incarceration, Plaintiff's credit cards were stolen from the Sheriff's "safekeeping" and used at numerous stores. Plaintiff Greene was subsequently informed that

approximately $1,400.00 worth of merchandise and services had been purchased with those credit cards while the cards were in the Sheriff's custody. Despite repeated requests for an investigation to Defendant A.C. Gilles and the Federal Bureau of Investigation, as of this filing, Plaintiff has not been informed of the performance of any inquiry into the matter, much less resolution.

19. Plaintiff Greene was released from the Shelby County Jail on September 11, 1996, only upon written word -- phone calls had not been accepted -- from his physician who stated incarceration posed a serious threat to Plaintiff Greene's health and life.

20. On December 5, 1996, at 12:35 p.m., Plaintiff Greene visited the Sheriff's Department at 157 Poplar Avenue in Memphis, Tennessee, on a separate matter. In retaliation to the September events, Defendants _____ (First Name Unknown) Vaught, a Sheriff's deputy, and another white unknown deputy, physically threw Plaintiff Greene, a 71 year-old man, out of the Sheriff's Department reception room and into the elevator, hitting his head on the rear wall of the steel elevator, smashing his glasses, and **[end 7]** causing extreme physical distress, including dizzy spells, shortness of breath, and heart palpitations.

That same day, Plaintiff Greene made a taped complaint to the Internal Affairs section of the Sheriff's Department, which he was later informed had been "lost." He made another taped complaint against the Judge, Sheriff, and Sheriff's Department a few days subsequent. Plaintiff Greene was informed that he would hear results of the investigation "in 30 days." As of this filing, Plaintiff Greene has not heard from the Sheriff's Department or of the Federal Bureau of Investigation.

21. That same day, December 5, 1996, Plaintiff Greene went to Methodist Hospital in a very unsteady state, where he was received into the Emergency Room. Hospital doctors and nurses attempted to lower his high blood pressure for nine

hours. Plaintiff Greene's heart physician doubled his prescribed heart medication until further notice. The medication has not been reduced as of this filing.

22. Plaintiff Greene was never formally notified of the basis for the criminal contempt citation and has not appeared before Judge Hackett since prior to this incident.

VI. CAUSE OF ACTION

23. Incorporating by reference the factual allegations in paragraphs 14 through 22, Plaintiff was denied his rights to free speech, to be free of unreasonable searches and seizures by the State of Tennessee, to be free from cruel and unusual punishment, **[end 8]** to be free from punishment without due process of law, to fundamental due process, to be free from an unconstitutional taking of property, to be notified of charges against him, to equal protection of the laws, and to be free from badges and incidents of slavery, pursuant to the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this court:

1. Assume jurisdiction over this action.

2. Declare unconstitutional Defendants' practice and behavior of depriving N.T. "Brother" Greene of his rights to free speech, to be free of unreasonable searches and seizures by the State of Tennessee, to be free from cruel and unusual punishment, to be free from punishment without due process of law, to fundamental due process, to be free from an unconstitutional taking of property, to be notified of charges against him, to equal protection of the laws, and to be free from badges and incidents of slavery, pursuant to the First, Fourth, Fifth, Eighth, Ninth, Thirteenth, and Fourteenth Amendments to the United States Constitution, as enforced through 42 U.S.C. § 1983.

3. Enter preliminary and permanent injunctions

immediately removing Defendants from their positions in the Shelby County government and the Sheriff's Department. **[end 9]**

4. Award Plaintiff the costs of this lawsuit and reasonable attorney's fees.

5. Award Plaintiff compensatory damages in the amount of $1 million for pain and suffering, as well as punitive damages in the amount of $3 million from Defendant William Hackett, $3 million from Defendant A.C. Gilles, and $300,000 each from Defendants Vaught and the Unknown White Deputy.

6. Order such additional relief as the Court may deem just and proper, including jury trial on the merits of this case.

Respectfully submitted this 4th day of September, 1997.

/s/ N.T. Brother Greene
(Address) **[end 10]**

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,

Plaintiff,

v.

WILLIAM HACKETT, et al.,

Defendants.

FILED
OCT 17 1997
ROBERT DI TROLIO, Clerk
(R.12)

CIVIL ACTION NO. 97-2799 TUV

ORDER OF PARTIAL DISMISSAL
ORDER DIRECTING PLAINTIFF TO AMEND COMPLAINT

Plaintiff, N.T. Greene, has submitted a complaint under 42 U.S.C. § 1983. Plaintiff paid the filing fee. The Clerk is directed to record the defendants as William Hackett, A.C. Gilless, and Deputy Vaught.[1]

---

[1] Plaintiff's claims against the "unknown white deputy" are frivolous. It is well settled that a complaint cannot be commenced against fictitious parties. *Bufalino v. Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968); *see also Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996)(explaining that a claim naming fictitious "John Doe" defendants does not commence an action and that a subsequent amendment identifying the defendant cannot relate back under Rule 15). Thus, to the extent that plaintiff

I. ANALYSIS OF CLAIMS

Plaintiff alleges that on September 6, 1996, General Sessions Judge William Hackett ordered him jailed for ten days after he engaged in a verbal altercation with Judge Hackett in a hallway at **[end 1]** the Shelby County Courthouse. Plaintiff further alleges that he had not appeared before Judge Hackett in any proceeding on that day nor had he appeared before him in the recent past.

Plaintiff further alleges that he was incarcerated in the bullpen of the Shelby County Jail (Jail) despite the fact that he had recently had surgery, was bandaged, and suffered from high blood pressure, asthma, and hemorrhoids. Plaintiff alleges no chairs were provided in the bullpen and he was required to sit on the floor in pooled urine. Plaintiff alleges the confinement in those unsanitary conditions endangered his health and life due to his recent surgery and unhealed incision. Plaintiff alleges that he saw the Jail nurse. Plaintiff alleges that he was released from the Jail on September 11, 1996, after producing written documentation from his physician.

Plaintiff alleges that his credit cards which were in the possession of the Sheriff's department during his incarceration were stolen and used to purchase merchandise and services.

Additionally, plaintiff alleges that on December 5, 1996, he went to the reception area of Sheriff Gilless' office where Deputy Vaught physically threw him into the elevator in retaliation for his complaints arising from his September

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seeks to file a complaint against an unknown deputy, he must identify the deputy and file a lawsuit within the one (1) year statute of limitations applicable in § 1983 actions. Tenn. Code Ann. § 28-3-104(a).

This document entered on docket sheet in compliance with Rule 58 and /or 79(a) FRCP on 10-21-97. **[end 1]**

incarceration. Plaintiff alleges that he hit his head, smashed his glasses, and suffered dizzy spells, shortness of breath, heart palpitations, and increased blood pressure. Plaintiff alleges that he was in the emergency room for nine hours after the incident due to his high **[end 2]** blood pressure. Plaintiff also alleges that his doctor increased his heart medication as a result of the incident.

A. LOSS OF PROPERTY

Plaintiff has no claim under § 1983 for deprivation of property. *Parratt v. Taylor*, 451 U.S. 527 (1981), held that a negligent deprivation of personal property by state officials is not actionable under § 1983 if the state provides an adequate remedy for that deprivation. *Davidson v. Cannon*, 474 U.S. 344 (1986) and *Daniels v. Williams*, 474 U.S. 329 (1986) held that "the Due Process Clause [of the Fourteenth Amendment] is simply not implicated by a negligent act of an official causing unintended loss of or injury to . . . property." *Hudson v. Palmer*, 468 U.S. 517 (1984) held that an intentional deprivation of personal property by state officials is not actionable under § 1983 if the state provides an adequate remedy for that deprivation. *See also Smith v. Rose*, 760 F.2d 102, 106 (6th Cir. 1985); *Brooks v. Dutton*, 751 F.2d 197 (6th Cir. 1985).

Tennessee affords an adequate remedy for losses such as that alleged by plaintiff under Tenn. Code Ann. § 2-20-205 (1995), part of Tennessee's Governmental Tort Liability Act (GTLA), which removes a county's immunity from damages suffered through the negligence of county employees acting within the scope of their duties, subject to certain exceptions inapplicable here. A person suffering damages or injuries due to the tortious conduct of a police officer of sheriff's deputy may sue the officer or the city, or the deputy or the county, depending on the circumstances. *See* **[end 3]** *Jenkins v. Loudon County*, 736 S.W.2d 603, 609 (Tenn. 1987) and *Johnson v. Smith*, 621 S.W.2d 570 (Tenn. App. 1981). While

the GTLA preserves the sovereign immunity of the state on behalf of cities and counties for intentional torts committed by their employees, *see Montgomery v. Mayor of the City of Covington*, 778 S.W.2d 444 (Tenn. App. 1988), it does not prevent an injured plaintiff from pursuing a claim against the city or county employee in his individual capacity. *See* Tenn. Code Ann. § 29-20-310(c)(Supp. 1995).

As Greene has an adequate state remedy if a county employee was responsible for the loss of property, he cannot invoke § 1983 to sue them for negligently or intentionally losing or damaging his property. All claims for loss of property lack an arguable basis either in law or in fact and are, therefore, frivolous. *See Denton v. Hernandez*, 504 U.S. 25, 31 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

B. Fourteenth Amendment Claims

Convicted inmates' rights stem from the Eighth Amendment, while pre-trial detainees' rights stem from the Fourteenth Amendment. *Thompson v. County of Medina*, 29 F.3d 238, 242 (6th Cir. 1994); *Roberts v. City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985). Since the scope of a detainee's Fourteenth Amendment rights are equivalent to that of a convicted inmate under the Eighth Amendment, *Thompson*, 29 F.3d at 242; *Roberts*, 773 F.2d at 723, plaintiff's status does not affect the analysis. **[end 4]**

The Eighth Amendment prohibits the intentional infliction of cruel and unusual punishment on an inmate. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Within the context of *Estelle* claims, the objective component requires the medical need to be sufficiently serious. *Hunt v. Reynolds*, 974 F.2d 734, 735 (6th Cir. 1992). "A medical need is serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980)(quoting *Laaman v. Helgemoe*, 437 F.Supp. 269, 311 (D.N.H. (1977)).

The Supreme Court has also clarified the subjective component -- the intent of the prison official. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Brooks v. Celeste*, 39 F.3d at 128. *Cf. Caldwell v. Moore*, 968 F.2d 595, 602 (6th Cir. 1992). The subjective component requires that the official act with the requisite intent, that is, that he have a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 297, 302-03. The official's intent must rise at least to the level of deliberate indifference. *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303.

In order to make out a claim of an Eighth Amendment *Estelle* violation, a prisoner must plead facts showing that "prison authorities have denied reasonable requests for medical treatment in the face of an obvious need for such attention where the inmate is thereby exposed to undue suffering or the threat of tangible **[end 5]** residual injury." *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976). According to *Farmer*, deliberate indifference requires that the inmate prove that an officer "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. In considering the types of conditions that constitute a substantial risk of serious harm, the Court considers not only the seriousness of the potential harm and the likelihood that the harm will actually occur, but evidence that unwilling exposure to that risk violates contemporary standards of decency, i.e., that society does not choose to tolerate this risk in its prisons. *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

Plaintiff does not allege that he suffered from any serious medical need while in the Jail. Plaintiff admits that he saw the Jail nurse while incarcerated. He alleges that he was not given "appropriate" medications at prescribed times. Plaintiff obviously received medication and medical treatment during his incarceration but he disagrees with the type of

medication and how it was given. Plaintiff's disagreement with the observations and conclusions of medical personnel does not convert his contentions into Eighth Amendment claims. *See, e.g., Hatch v. Stempson*, 1990 U.S. Dist. LEXIS 988, slip op. at 4-5 (D.D.C. Jan 31, 1990)(inmate not entitled to refuse "Bufferin" and demand "Motrin"). Federal courts will not engage in second guessing the choice of a treatment program by medical personnel. *See, e.g., Westlake*, 537 F.2d at **[end 6]** 860, n. 4. Plaintiff's own allegations show that he was not refused treatment while at the Jail. Therefore, plaintiff also fails to allege facts showing deliberate indifference on the part of any defendant.

Even analyzing plaintiff's allegations as a claim that the defendants acted with deliberate indifference to his personal safety, plaintiff still has no claim. The Eighth Amendment proscription on cruel and unusual punishment also encompasses an inmates's right to personal safety. *Stewart v. Love*, 796 F.2d 43, 44 (6th Cir. 1982). A safety claim is analyzed under the same two-component standard set forth above. In order to establish that a defendant was deliberately indifferent, the inmate must prove that the officer "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety; the official must [have been both] aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and he must also [have drawn] the inference." *Farmer*, 511 U.S. at 837.

It is clear from the foregoing *Estelle* analysis of plaintiff's allegations that he can not satisfy either the objective or subjective component of an Eighth Amendment safety claim. He does not allege that he suffered any harm from sitting on the floor. He does not allege that his surgical wound was ever unbandaged, in contact with any unsanitary conditions, or that clean dressings were not provided. Likewise, he fails to allege any way in which the conditions of incarceration aggravated or worsened his condition. Plaintiff only alleges that he had

received medical **[end 7]** attention from a physician's assistant which apparently resulted no restrictions. Plaintiff admits that he received medical attention during his stay. Thus, he does not allege any action which shows deliberate indifference on the part of any named defendant.

In short, plaintiff's allegations fail to satisfy either the objective or subjective component for any Fourteenth Amendment violation. The Court finds that these claims also lack an arguable basis either in law or in fact and are, therefore, frivolous. *See Denton*, 504 U.S. at 31; *Neitzke*, 490 at 325.

C. Claims Against Gilless

Insofar as plaintiff sues Gilless, there is no respondeat superior liability under § 1983. *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658 (1978); *Bellamy*, 729 F.2d 416 at 421 (liability under § 1983 in defendant's personal capacity must be predicated upon some showing of direct, active participation in the alleged misconduct). Plaintiff does not allege how Gilless was made aware of his physical condition or how he was made aware of that plaintiff was sitting in pooled urine or not receiving medication. Likewise, he fails to allege that Gilless in any way participated in or directed the physical removal of plaintiff from the reception area of Gilless' office. It is clear from the face of the complaint, even construed liberally under *Haines v. Kerner*, 404 U.S. 519 (1972), that plaintiff relies entirely on the supervisory capacity of Gilless over the jail as the basis for his claims that Gilless violated their rights. **[end 8]**

Greene's claims against Gilless lack an arguable basis either in law or in fact and are, therefore, frivolous. *See Denton*, U.S. at 31; *Neitzke*, 490 U.S. at 325.

D. Claims Against Hackett In His Official Capacity

Plaintiff has sued Shelby County General Sessions Judge Hackett in his official and personal capacity. To the extent that plaintiff sues Hackett in his official capacity, the Court must determine whether Hackett represents the State or the county when he acts in his judicial capacity.

Utilizing the analysis provided by the United States Supreme Court in *McMillan v. Monroe County, Ala.*, 117 S.Ct. 1734, 1737-1749 (1997), this Court considers the following factors. General Sessions Courts were created and established by the Tennessee Legislature, Tenn. Code Ann. § 16-15-101, and are part of the state's judicial system, Tenn Const. art. VI, § 1. The jurisdiction of the General Sessions Court is also defined by statute, Tenn. Code Ann. § 16-15-501, as are its powers and duties, *id.* §§ 16-15-401, 16-15-402. Moreover, a General Sessions Court judge's salary is set by the Tennessee Legislature, *id.* §§ 16-15-5001, 16-15-5003, and each county is required by statute to provide a courtroom and necessary supplies and equipment for the General Sessions Court, *id.* § 16-15-102. Furthermore, a General Sessions Court judge's judicial decisions are reviewable in the state court system, beginning with an appeal to the Circuit Court, *id.* §§ 16-4-108 (civil), 16-5-108 (criminal), and finally to the state Supreme Court, *id.* § 16-3-201. Finally, state judges may be removed by the **[end 9]** Tennessee Legislature, Tenn. Const. art. VI. § 6, and the Governor has the power to appoint and commission special judges if any state judge should become disabled, Tenn. Code Ann. § 17-2-116. Therefore, Hackett represents the State when he acts in his judicial capacity.

Accordingly, plaintiff's claim against Hackett in his official capacity is really a claim against the State of Tennessee. The State of Tennessee is immune from suit under the Eleventh Amendment, which prohibits suits against a state in federal court. *Pennhurst State Schl. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984); *Quern v. Jordan*, 440 U.S. 332 (1979). Furthermore, a state is not a person within the meaning of § 1983. *Will v. Michigan*, 109 S.Ct. 2304 (1989).

The plaintiff's claims against Hackett in his official capacity are therefore barred by the Eleventh Amendment and do not fall within the purview of § 1983. Those claims lack an arguable basis either in law or in fact and are, therefore,

frivolous. *See Denton*, 504 U.S. at 31; *Neitzke*, 490 U.S. at 325.

II. ORDER OF PARTIAL DISMISSAL

Accordingly, the foregoing claims lack an arguable basis either in law or in fact and are, therefore, frivolous. *See Denton*, 504 at 25; *Neitzke*, 490 U.S. at 325. **[end 10]**

As the above claims are frivolous, those claims are DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

III. ORDER TO AMEND COMPLAINT

Turning to the claims against Hackett in his personal capacity, the Court finds that plaintiff does not relate the disposition of any criminal charge which arose from his verbal altercation with Hackett. Plaintiff must have a final determination of those underlying charges in his favor before he can bring this action. If plaintiff has not received a final determination on those charges, his cause of action has not yet accrued and this Court will be forced to dismiss his complaint without prejudice.

Heck v. Humphrey, 114 S.Ct. 2364 (1994), held that a criminal defendant may not recover damages under 42 U.S.C. § 1983 for "harm caused by actions whose unlawfulness would render [his] conviction or sentence invalid" unless "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 114 S.Ct. at 2372. *Heck* does not rest on statutory language, legislative history, comity, or any other consideration unique to actions under 42 U.S.C. § 1983. It rests instead on the need for finality of criminal convictions and on the analogy between actions under § 1983 and the common law of malicious prosecution, which barred the suit unless the criminal **[end 11]** prosecution ended in the plaintiff's favor. *Heck*, 114 S.Ct. at 2370-72.

Accordingly, it is unclear from the complaint as filed

whether any claim has accrued as yet. Plaintiff shall file an amended complaint regarding this claim within the time limits set forth below, explaining what charges were filed against him, and whether those charges have been resolved.

The plaintiff is therefore directed to amend his complaint to explain what charges were filed against him, and whether those charges have been resolved. Mere opinions, beliefs, speculation, or other conclusory allegations will not be considered to state a cause of action.

This order requires the plaintiff to file an amendment based on his own personal knowledge. It does not require any discovery from defendants, nor any legal research. It does not need to be written in what plaintiff imagines is legal-sounding language. The plaintiff should simply tell the facts in plain, simple, English, using short sentences and short paragraphs to communicate effectively. He shall not file any supporting brief or affidavits from other inmates or persons. He shall not include any legal authority, citations, or arguments. He shall not attach any exhibits. He shall not file any motions, briefs, or affidavits of any sort until after the Court grants permission following the filing of the amended complaint. The amendment shall be neatly printed or typed on the Court's standard form for filing § 1983 complaints and on not more than six additional sheets of 8 ½ by **[end 12]** 11 inch paper, leaving a margin of at least one inch on the top and bottom and both sides, with writing on only one side to a sheet. The plaintiff must personally sign the amendment.

Plaintiff must file this amendment within twenty (20) days of the docketing of this order. A failure to timely file an amendment in compliance with this order will result in the complaint being dismissed.

It is further ORDERED that the plaintiff shall serve a copy of the amended complaint and every further document filed in this cause on the attorney for each defendant, or on the defendant if he has no attorney. The plaintiff shall make a

certificate of service on every document filed. The plaintiff shall promptly notify the Clerk of any change of address or whereabouts. Failure to comply with these requirements, or any other order of the Court, may result in this case being dismissed without further notice.

IT IS SO ORDERED this 17th day of October, 1997.

/s/ Jerome Turner
United States District Judge
[end 13]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED NOV 7 1997 ROBERT DI TROLIO, Clerk (R.13)
Plaintiff-*pro se*,	)	
v.	)	
WILLIAM HACKETT, et al.,	)	CIVIL ACTION NO. 97-2799 TUV
Defendants.	)	

MOTION REQUESTING THE APPOINTMENT OF AN ATTORNEY OR AN EXTENSION OF TIME OF UP TO NINETY (90) DAYS TO RESPOND TO THE ORDERS OF THIS COURT

Comes the plaintiff, in person, and request this Court for authorization of the appointment of an attorney for this plaintiff in this case.

This plaintiff had a very unfortunate incident occur during the eleven (11) months since September 6, 1996 regarding this case. The result was this plaintiff had to file this case himself to comply with the time rule.

Or to grant an extension of time of up to ninety (90) days for him to find one to respond to this courts orders in this case.

This plaintiff experience has been that the various attorneys he has requested to represent him are really scared to face white judges and others in Memphis, Tennessee.

This motion is based on the 5th, 6th, 9th, 13th and 14th

amendment to the US Constitution.

/s/ N.T. Brother Greene
(Address)

CERTIFICATE OF SERVICE
Friday November 7,1997. **[end 1]**

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED NOV 10 1997 ROBERT DI TROLIO, Clerk (R.14)
Plaintiff,	)	
v.	)	
	) CIVIL ACTION	
WILLIAM HACKETT, et al.,	) NO. 97-2799 TUV	
Defendants.	)	

ORDER ON MOTION
FOR APPOINTMENT OF ATTORNEY
OR AN EXTENSION OF TIME

The *pro se* plaintiff has requested the appointment of an attorney or an extension of time to respond to this court's order directing him to file an amended appeal.

A district court is vested with broad discretion in determining whether to appoint counsel for an indigent civil litigant. *See McMath v. Alexander*, 486 F. Supp. 156, 157 (M.D. Tenn. 1980). However, appointment "is justified only by exceptional circumstances." *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985); *Willett v. Wells*, 469 F. Supp. 748, 751 (E.D. Tenn. 1977), *aff'd*, 595 F.2d 1227 (6th Cir. 1979). In determining whether "exceptional circumstances" exist, this court is directed to consider, *inter alia*, "the type of case and the abilities of the plaintiff to represent himself." *Archie v. Christian*, 812 F.2d 250, 253 (5th Cir. 1987). *See also, Poindexter v. Federal Bureau* **[end 1]** *of Investigation*, 737

F.2d 1173, 1185 (D.C. Cir. 1984). This typically involves a determination of the "complexity of the factual and legal issues involved." *Cookish v. Cunningham*, 787 F.2d 1, 3 (1st Cir. 1986).

Having considered the relevant factors here, this court concludes that exceptional circumstances warranting appointment of counsel do not exist at this time. Accordingly, plaintiff's motion requesting the appointment of an attorney is denied.

As to plaintiff's request for an extension of 90 days to amend his complaint, the court will grant the request to a limited extent. Plaintiff shall have thirty (30) days following entry of this order to file the amended complaint as directed in this court's order entered October 21, 1997.

IT IS SO ORDERED this 10th day of November, 1997.

/s/ Jerome Turner
United States District Judge
[end 2]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED JAN 12 1998 ROBERT DI TROLIO, Clerk (R.25)
Plaintiff-in person,	)	
v.	)	
	)	CIVIL ACTION
WILLIAM HACKETT, ET AL.,	)	NO. 97-2799 TUV
Defendants.	)	

NOTICE OF APPEAL

Come the plaintiff, in person, gives notice that he is appealing the above numbered case to the United States Court of Appeals for the 6th Circuit in Connecticut, Ohio.

There are two major aspects to this case. One is the procedural and one addresses the substance of the issues in this case. The clerk of the District Court issued a default order on October 6, 1997, in favor of this plaintiff. The court, on its on, set aside that order on October 20, 1997. This plaintiff asked the court for a hearing on the order to set aside. A clear denial of that request by the court was filed on January 2, 1998.

Therefore, I am appealing the total case in order to preserve the substantive issues of this case for a later date in the District Court. The specific question I am requesting this (6th Circuit) Court to act on is the right of a due process hearing on the order to set aside. This plaintiff believes it is wrong for the District Court judge to use his discretionary power to totally disregard authority and power to issue an order of default in this

case or direct the District Court to do that or the very least to order the District Court to have a hearing on that issue. **[end 1]**

Respectfully submitted,

/s/ N.T. Brother Greene
(Address)

CERTIFICATE OF SERVICE
January 12, 1998.
Note: Check enclosed **[end 2]**

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED JAN 14 1998 ROBERT DI TROLIO, Clerk (R.27)
Plaintiff,	)	
v.	)	
WILLIAM HACKETT, et al.,	)	CIVIL ACTION NO. 97-2799 TUV
Defendants.	)	

ORDER OF DISMISSAL

On October 21, 1997, this court entered an Order of Partial Dismissal and Order Directing Plaintiff to Amend Complaint, which required plaintiff to file an amended complaint to state which charges were filed against him, and whether those charges have been resolved. The order directed plaintiff to file an amended complaint within 20 days of the docketing of the order and stated that the "failure to timely file an amendment in compliance with this order will result in the complaint being dismissed." On November 10, 1997, the court granted the plaintiff an extension of 30 days to file the required amendment. Since plaintiff did not file the required amended complaint, on December 18, 1997, the court entered its Order on Motion Requesting Hearing on Default Set Aside and Order to Show Cause in which plaintiff was ordered to show cause within 10 days following entry of that order why the complaint should not be dismissed for failure to prosecute. The **[end 1]** order stated that the filing of the amendment to the complaint would suffice

to respond to the order to show cause and further warned that "[i]n the event that the plaintiff fails to properly respond to this order and to show cause, this action may be dismissed with prejudice for failure of the plaintiff to prosecute pursuant to Rule 41 of the Federal Rules of Civil Procedure."

To date plaintiff has not filed the amendment as ordered by the court. A pro se plaintiff's complaint may be dismissed when the plaintiff has been directed to amend a complaint and given notice that dismissal will be the penalty for failure to comply. *See Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988). Furthermore, dismissal is appropriate when a pro se plaintiff fails to comply with "readily comprehended court deadlines." *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991). Each of the court's orders stated a readily comprehended deadline. This cause is therefore dismissed with prejudice for failure to comply with the order to amend, entered on October 21, 1997, and the order to show cause, entered on December 18, 1997.

IT IS SO ORDERED this 13th day of January, 1998.

/s/ Jerome Turner
United States District Judge
[end 2]

No. 98-5147
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N.T. BROTHER GREENE,	)	FILED MAY 1 1998 LEONARD GREEN, Clerk (R.30)
Plaintiff-Appellant,	)	
v.	)	
	)	ORDER
WILLIAM HACKETT, in his personal and official capacity General Sessions Court Judge of Shelby County, Tennessee, Division II; A.C. GILLESS, in his personal and official capacity as Shelby County Sheriff, VAUGHT, First Name Unknown, in his personal and official capacity as Shelby County Deputy Sheriff,	)	
Defendants-Appellees.	)	

Before KENNEDY, CONTIE, and MOORE, Circuit Judges

This matter is before the court upon initial consideration of appellate jurisdiction.

The review of the documents before the court indicates that a default judgment was entered on October 6, 1997. The default judgment was set aside by order entered October 20, 1997. A partial dismissal of the case was entered on October 21, 1997. Appellant appealed on January 12, 1998 from the order setting aside the default judgment. The judgment of the

district court was entered on January 20, 1998.

This court lacks jurisdiction in this appeal. At the time the notice of appeal was filed, no appealable order had been entered by the district court. An order setting aside a default judgment is **[end 1]** not appealable. *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1028 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988).

It is ordered that this appeal is dismissed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk **[end 2]**

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED MAY 13 1998 ROBERT DI TROLIO, Clerk (R.31)
Plaintiff,	)	
v.	)	
WILLIAM HACKETT, ET AL.,	)	CIVIL ACTION NO. 97-2799 TUV
Defendants.	)	

MOTION TO EXTEND TIME TO FILE THIS APPEAL TO THE 6TH U.S. CIRCUIT COURT

Come the plaintiff, in person, and request the Court to grant this plaintiff time to re-file his appeal properly with the U.S. Appeals Court for the 6th Circuit in Cincinnati, Ohio.

This 72-year-old Black plaintiff's rights were abused by White government officials in this city that almost cost him his life. He was lucky enough to escape being killed by them on at least two different occasions, in jail by be being denied medication that was prescribed by his doctors and once on a visit to the county officials' office.

Also, there were two different very strange automobile "accidents" where the car this plaintiff was in was totally destroyed (a total loss), and another "accident" in his car where more than $10,000 worth of damages was caused to this plaintiff's car within a period of 5 weeks, after this suit was filed by this plaintiff. Luckily, this plaintiff was only injured, and not killed in either case.

The absolute fear that exists in this city is almost unbelievable among its citizens, especially its Black citizens. If the fear only existed with this plaintiff, that would be one **[end 1]** thing. Even some Black officials here have openly admitted to this plaintiff their fear. Several Black lawyers have also indicated their apprehension to this plaintiff as a result of this plaintiff attempting to get them to represent this case with a White judge and some sheriffs being the defendants.

This plaintiff took some of his life savings of just over $5,000[1] for a lawyer, to ensure that this case would be tried and handled properly in 1997. Almost an entire year had passed, and no proper action was taken by that lawyer on this case. Because of the one (1) year time limit that would prevent this plaintiff from filing this suite, he is trying to handle the case himself. There is no question; this plaintiff is greatly handicapped in trying to represent this case. After having so much trouble trying to get a lawyer in Memphis, this plaintiff tried Jackson, MS; Nashville, TN; St. Louis, MO; Little Rock, AR; and elsewhere to get some lawyer to represent this case for him. He even asked the Court to appoint an attorney to represent this case, hoping that if the Court authorized the appointment of an attorney, this plaintiff might get one. However, the Court knows what its ruling was on that request.

This Court has the authority to help this plaintiff rid this community of the fear that now exists here. This Court can and this plaintiff hopes that it will say the U.S. Constitution is alive and well in Memphis, TN.

The plaintiff does not clearly understand the F.R.A.P., rule 4, 5, or 5.1. But this plaintiff does requests that this Court allow the due process provisions of the U.S. Constitution, to help restore the belief that it is no longer necessary to be scared

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[1] A copy of a cancelled check can be offered to the Court as proof. **[end 2]**

and intimidated where your rights are concerned in Memphis, TN.

/s/ N.T. Brother Greene
(Address)

CERTIFICATE OF SERVICE
May 13, 1998 **[end 3]**

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED MAY 21 1998 ROBERT DI TROLIO, Clerk (R.33)
Plaintiff,	)	
v.	)	
WILLIAM HACKETT, ET AL.,	)	CIVIL ACTION NO. 97-2799 TUV
Defendants.	)	

AMENDMENT TO THE MOTION TO EXTEND TIME TO FILE THIS APPEAL TO THE 6TH U.S. CIRCUIT COURT OF APPEALS, REQUESTING THE DISTRICT COURT'S PERMISSION TO APPEAL IT'S ORDER DISMISSING THIS CASE

Comes the Plaintiff, in person, and requests this court grant him permission to appeal, out of time, to the court of appeals.

Respectfully submitted,

/s/ N.T. Brother Greene
(Address)

CERTIFICATE OF SERVICE
May 21, 1998. **[end 1]**

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
TENNESSEE WESTERN DIVISION

N.T. BROTHER GREENE,	)	FILED JUN 4 1998 ROBERT DI TROLIO, Clerk (R.36)
Plaintiff-Appellant,	)	
v.	)	
WILLIAM HACKETT, et al.,	) CIVIL ACTION) NO. 97-2799 TUV	
Defendants-Appellees.	)	

NOTICE OF APPEAL

Come the plaintiff, in person, to give notice that he is appealing the order of this court dated May 22, 1998 to the 6th Circuit Court of Appeals in Cincinnati, Ohio. The May 22, 1998 order clearly suggest that this plaintiff sat on his hands and did nothing for several weeks regarding this appeal. That suggestion is totally misleading and the record will clearly show that this plaintiff took various legal actions to protect his constitutional rights.

This is my notice and another filing fee is enclosed.[1]

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[1] Note: When this plaintiff filed a previous Notice of Appeal, he paid the filing fee. The judges in Cincinnati concluded that they had no appeal before them to consider, because they had no timely final order from the District Court. Since they had nothing to consider, why is it necessary for this plaintiff to pay another filing fee to have the

Respectfully submitted,

/s/ N.T. Brother Greene
(Address)

CERTIFICATE OF SERVICE
June 4, 1998.

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judges rule on this appeal? If there was nothing for the Appeal judges to **[end 1]** consider, why must this plaintiff have to pay again to have his appeal considered by the Appeal Court judges now? **[end 2]**

No. 98-5831
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N.T. BROTHER GREENE,	)	FILED DEC 17 1999 LEONARD GREEN, Clerk
Plaintiff-Appellant,	)	
v.	)	
	)	ORDER
WILLIAM HACKETT, in his personal and official capacity General Sessions Court Judge of Shelby County, Tennessee, Division II; A.C. GILLESS, in his personal and official capacity as Shelby County Sheriff, VAUGHT, First Name Unknown, in his personal and official capacity as Shelby County Deputy Sheriff,	)	
Defendants-Appellees.	)	

Before MERRITT and SILER, Circuit Judges, BECKWITH, District Judge.[1]

This is an appeal from an order of the district court denying the appellant an extension of time for filing a notice of

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[1] The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

appeal. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Appellant filed [end 1] a 42 U.S.C. § 1983 civil rights action. Appeal No. 98-5147 was taken from an order setting aside a default judgment but that appeal was dismissed by this court for lack of jurisdiction. Meanwhile, the district court entered its judgment on January 20, 1998. Appellant filed a motion for extension of time for filing a notice of appeal of May 13, 1998. That motion was not a timely filed Fed. R. App. P. 4(a)(5) motion for extension of time. The district court denied the motion for an extension of time, appellant timely appealed, and that appeal was docketed as appeal No. 98-5831.

The district court did not abuse its discretion in denying the extension of time because it lacked authority to grant the untimely filed motion. *SeeMartinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994)(per curiam); *Beard v. Carrollton R.R.*, 893 F.2d 117, 120 (6th Cir. 1989).

Accordingly, the order of the district court denying an extension of time is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk [end 2]

Civil Appeals Checklist

1. Appealable Orders: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

Appeals from Final Orders Pursuant to 28 U.S.C. § 1291:
Only final judgments (or orders) of district courts (or final orders of bankruptcy courts which have been affirmed by a district court under 28 U.S.C. § 158) usually are appealable. A "final" order is one which ends the litigation on its merits and leaves nothing for the district court to do but execute the judgment. A magistrate's report and recommendation is not usually final until judgment thereon is entered by a district court judge. Compare Fed.R.App.P. 5.1, 28 U.S.C. § 636(c).

In cases involving multiple parties or multiple claims, a judgment as to fewer than all parties or all claims is not a final, appealable decision. Fed.R.App.P. 54(b) does permit the district court to expressly direct entry of the judgment as to fewer than all of the claims or parties. *See Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1369 (11th Cir. 1983), *cert. denied* 464 U.S. 893 (1983). Certain matters, such as attorney's fees and costs, are collateral and do not affect the time for appealing from the judgment on the merits. *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 108 S. Ct. 1130, 99 L.Ed 2d 289 (1988); *Budinich v. Becton*, 486 U.S. 196, 108 S. Ct. 1717, 100 L.Ed 2d 178 (1988).

Appeals Pursuant to 28 U.S.C. § 1292(b) and FRAP 5: The certificate specified in 28 U.S.C. § 1292(b) must be obtained before an application for leave to appeal is filed in the Court of Appeals. Denial or refusal by the district court to issue the certificate is not itself appealable.

Appeals Pursuant to 28 U.S.C. § 1292(a):
Pursuant to this statute, appeals are permitted from orders

"granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and "(i)nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases..." This statute does not permit appeals from temporary restraining orders.

Appeals Pursuant to Judicially Created Exceptions to the Finality Rule:

These limited exceptions are discussed in many cases, including (but not limited to): *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); *Forgay v. Conrad*, 6 How. (47 U.S.) 201 (1848); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed2d 199 (1964); *Atlantic Federal Savings & Loan Assn. of Ft. Lauderdale v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371 (11th Cir. 1989). Compare *Coopers and Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed2d 351 (1978); *Gulfstream Aerospace Corp. v. Mayacomas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed2d 296 (1988).

2. Time for Filing: To be effective a notice of appeal must be timely filed. Timely filing is jurisdictional. In civil cases FRAP 4(a) sets the following time limits:

FRAP 4(a)(1):

The notice of appeal required by FRAP 3 "shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry..." (Emphasis added) To be effective, the notice of appeal must be filed in the district court clerk's office within the time permitted. If a notice of appeal is mailed, it must be timely received and filed by the district court to be effective. A prisoner's notice of appeal will be "deemed filed" when delivered to prison authorities for mailing. *Houston v. Lack*, 487 U.S. 266, 108

S.Ct. 2379, 101 L.Ed2d 245 (1988).

FRAP 4(a)(3):
"If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires." (Emphasis added)

FRAP 4(A)(4):
Timely service and filing, as required under the rules (see also Fed.R.Civ.P. 6(b)), of motions under Fed.R.Civ.P. 50(b), 52(b) or 59 destroys the finality of the judgment and renders any notice of appeal filed before disposition of the motion(s) without effect. *See Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir. 1990). A new notice of appeal must be filed after disposition of the motion.

FRAP 4(a)(5) and FRAP 4(a)(6):
The district court has power to extend the time to file a notice of appeal. Under FRAP 4(a)(5) the time may be extended if a motion for extension is filed within 30 days after expiration of the time otherwise permitted to file a notice of appeal. Under FRAP 4(a)(6) the time may be extended if the district court finds upon motion that a party has not received notice of entry of the judgment or order and that no party would be prejudiced by an extension.

3. Format of Notice of Appeal: Form 1, FRAP Appendix of Forms, is a suitable format. *See also* FRAP 3(c). A single notice of appeal may be filed from a (single) judgment or order by one or more persons whose "interests are such as to make joinder practicable..." (FRAP 3(b))

4. Effect of Notice of Appeal: A district court loses

jurisdiction (authority) to act after the filing of a timely and effective notice of appeal, except for actions in aid of appellate jurisdiction (see Fed.R.Civ.P. 60) or to determine an award of attorney's fees to a prevailing party. *See United States v. Rogers*, 788 F.2d 1472 (11th Cir. 1986); *Budinich v. Becton*, 486 U.S. 196, 108 S. Ct. 1717, 100 L.Ed 2d 178 (1988).
[end 1]

No. 98-5831
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

N.T. BROTHER GREENE, Plaintiff-Appellant, v. WILLIAM HACKETT, in his personal and official capacity General Sessions Court Judge of Shelby County, Tennessee, Division II; ET AL., Defendants-Appellees.	)	FILED FEB 18 2000 LEONARD GREEN, Clerk ORDER

Before MERRITT and SILER, Circuit Judges, BECKWITH, District Judge.[1]

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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[1] The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk **[end 1]**

(3)

Supreme Court, U.S.
FILED
JUL 24 2000
CLERK

No. 99-1867

IN THE

Supreme Court of the United States

N.T. BROTHER GREENE,

Petitioner,

v.

WILLIAM HACKETT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The Petitioner asks this Court to hold that the District Court be required to appoint an attorney or provide notice of time to appeal to a *pro se* litigant in districts that do not provide such notices. Petitioner's case was dismissed not because of failing to have notice of when to appeal. Petitioner's case was dismissed because of his failure to follow direct and clear court orders to amend his complaint. Only after numerous warnings and the subsequent failure to amend did the need to appeal arise.

Supreme Court Rule 10 states that review by the United States Supreme Court shall be granted only for compelling reasons such as when:

> [A] United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

This case does not involve such conflicting rulings which would necessitate review by the Supreme Court. The rules governing when to file a notice of appeal are uniform throughout all of the United States Circuits. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure states that notice of appeal ". . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

The only post-judgment notice of appeal filed by the Petitioner was on May 13, 1998, 113 days after the January 20, 1998 dismissal of his case.

Furthermore, Respondents were never properly served nor was service ever waived. Rule 4(d) and 4(e) of the Federal Rules of Civil Procedure require that service be by hand delivery or mail with written waiver of service. No respondent ever signed for the mailed summons and complaint and no respondent ever waived service, therefore the default judgment was in error and was properly set aside.

Not only is Petitioner's case procedurally invalid but it is also substantively invalid. Petitioner committed a criminal contempt in the presence of Judge Hackett and therefore was properly jailed. Furthermore, Petitioner fails to identify and specific policy or practice of the Respondents which led to a civil rights violation as required under 42 U.S.C. § 1983. Petitioner's case is procedurally and substantively invalid and the Petition should be denied.

I.

THE RULES GOVERNING WHEN TO FILE A NOTICE OF APPEAL ARE UNIFORM AMONG ALL UNITED STATES CIRCUIT COURTS

The thirty day time limit for appealing as of right under Rule 4(a) of the Federal Rules of Appellate Procedure is national, mandatory, and jurisdictional. Its purpose is to set a definite point of time when litigation shall end, unless within that time prescribed application has been made, and, if it has not, to advise prospective appellees that they are free of the appellant's demand. *Browder v. Director, Dep't*

of Corrections, 434 U.S. 257, 98 S. Ct. 556, 54 L. Ed. 2d 521, *reh. den.*, 434 U.S. 1089, 98 S. Ct. 1286, 55 L. Ed. 2d 795 (1978); *Donlin v. Watkins*, 814 F.2d 273 (6th Cir. 1987); *McConnell v. Barker*, 504 F.2d 1110 (6th Cir. 1974). Rule 4(a)(5) reads in pertinent part,

> The district court may extend the time to file a notice of appeal if a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and that party shows excusable neglect or good cause.

Petitioner first purported to file an appeal of an interlocutory order on January 12, 1998. (Pet. App. 24.) The Judgment of the District Court case was entered January 20, 1998. (Pet. App. 26.) Following dismissal of the interlocutory-order appeal on May 1, 1998 (Pet. App. 28), Petitioner filed back in District Court a Motion to Extend Time to file his appeal. (Pet. App. 30.) This was filed May 13, 1998, some four months after the District Court Judgment. (Pet. App. 30.) The District Court found that no excusable neglect or good cause existed that would justify extending the time to file an appeal. Moreover, Petitioner did not state *any* reason for the motion to extend time. The Court ruled that, in any event, the motion was well outside the time limit as provided by Rule 4(a) of the Federal Rules of Appellate Procedure, and therefore the Court lacked jurisdiction to make such an extension order. (R. 90, Order on Motion to Extend Time to File This Appeal to the Sixth United States Circuit Court.)

Rule 4(a) of the Federal Rules of Appellate Procedure is a uniform rule for all federal circuit courts. The rule does not vary from circuit to circuit. Because Petitioner's notice

of appeal filed on May 13, 1998, was outside of the time limit prescribed by the rule, the court had no jurisdiction over the case and it was correctly dismissed.

II.

THE PETITION IS NEITHER PROCEDURALLY NOR SUBSTANTIVELY VALID

The Petitioner portrays his case as one that was unjustly dismissed, an appeal that was unfairly denied, and one worthy on both procedural and substantive grounds. In reality, Petitioner's case was dismissed because of willful failure to follow repeated, detailed orders to file an amended complaint. Regarding the initial default order in this case, Respondents had never been properly served and service was never waived, therefore the default was properly set aside. Further, the default judgment set-aside, from which Petitioner made an interlocutory appeal, was untimely since an order setting aside a default judgment is not an appealable order. *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1028 (9th Cir. 1987, *cert. den.*, 485 U.S. 905 (1988). But not only is Petitioner's case procedurally flawed. It is also substantively flawed. Petitioner committed contempt in the presence of the Court and was properly jailed. Petitioner cited no policy or procedure of the county government at issue, as required to state a claim against a local government entity under federal civil rights law. For these reasons, this petition should be denied as it does not meet the criteria for Supreme Court review as stated in Rule 10 of the Rules of Supreme Court.

A. Petitioner Failed to Obtain Relief Because His Case Was Dismissed for Failure to Follow An Order to Amend, Not Because of a Faulty Appeal.

On October 21, 1997 the District Court ordered the Petitioner to amend his complaint and told the Petitioner step-by-step the kind of allegations that would be needed to set out a claim, what kind of paper to file the amendment on, and to sign it and send a copy to Respondent's attorney. (Pet. App. 18.) The court also prohibited the Petitioner from filing any more papers until permission was granted by the Court, after he filed the amendment. *Id.* The Petitioner never filed an amendment as directed by the court. Yet, over the next three months he did file four motions and two other documents with the court. (Pet. App. 20, Motion Requesting Appointment of an Attorney; Motion to Recuse; Motion for a Hearing; R. 22, Response to an Order; Pet. App. 24, Notice of Appeal [interlocutory] appealing the default set-aside, R. 11.)

The court warned Petitioner repeatedly that failure to comply with the orders would result in dismissal, "Failure to comply with these requirements, or any other order of the Court, may result in this case being dismissed without further notice." (Pet. App. 19.) The Court eventually ordered petitioner to show cause why the case should not be dismissed specifying that filing an amendment would suffice as a response. (R. 18.) On November 10, 1997 the Court even granted the Petitioner an extension of thirty days to file his amended complaint. (Pet. App. 22-23.) Petitioner never complied. (Pet. App. 26-27.)

Despite numerous orders of the Court and a thirty day extension, the Petitioner still ignored the Court's order.

For that reason, the Petitioner's case was dismissed with prejudice for failure to prosecute or show cause why it should not be dismissed. The Court relied upon *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991), and stated that, " '. . . dismissal is appropriate when a *pro se* plaintiff fails to comply with readily comprehended court deadlines.' " (Pet. App. 27.) Therefore even a successful appeal before this Court and remand to the lower Courts would not aid Petitioner, who allowed his case to be dismissed below by wilfully failing to heed numerous Court orders.

B. Petitioner Had No Valid Claim to Appointment of Counsel.

Petitioner states that if the court would not give a notice concerning the time to appeal then an attorney should have been provided for him. However, "It is well settled that in civil actions the appointment of counsel should be allowed only in exceptional cases. And, it is inappropriate to request an attorney to serve a plaintiff whose likelihood of success in his action is highly dubious." *Willett v. Wells*, 469 F. Supp. 748, 751 (E.D. Tenn. 1977) (several citations omitted). The *Willett* Court denied appointment of counsel for a "plaintiff [who] does not appear to be in more exceptional circumstances than most state prisoners who undertake to hail into court everybody connected in any way with that prisoner's conviction of crime in an effort to collect money damages form them," and suggested it would be appropriated to dismiss that plaintiff's claims a frivolous and malicious.

In *McMath v. Alexander*, 486 F. Supp. 156, 157 (M.D. Tenn. 1980), the Court denied appointment of counsel to an indigent prisoner in a civil suit even thought the complaint "set forth the nature of their claims quite clearly," because the allegations simply did not raise any constitutional basis.

Although Petitioner is not a convicted prisoner, the analysis parallels in every other respect. As the District Court found, Petitioner's circumstances are not exceptional. (Pet. App. 23). The Court had already advised Petitioner step-by-step on the procedure and types of allegations necessary for amending his complaint. (Pet. App. 18). The Court dismissed a number of his allegations as failing to state a constitutional claim, and labeled each as "frivolous." (Pet. App. 9, 15, 17). This is not a proceeding *in forma pauperis* as in 28 U.S.C. § 1915(e). Petitioner does not claim to be indigent; on the contrary, he alleges to have paid all or part of $5000 to an attorney (not his current counsel) to prosecute this claim, but the attorney did nothing. He approached a number of attorneys, none of whom would take the case. (Pet. App. 20). The record supports no grounds for appointment of an attorney. Denial of appointed counsel was appropriate and no valid argument to the contrary may be found in existing law.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this honorable Court deny the Petition.

Respectfully submitted,

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